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ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

UNITED TRANSPORTATION UNION,

Petitioner,

vs.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Special Court,
Regional Rail Reorganization Act of 1973

BRIEF IN OPPOSITION

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Counter-Statement of Questions Presented

1. Whether 45 U.S.C. §1105(b), which gives this Court jurisdiction by direct appeal to review "orders or judgments" finding a provision of the Northeast Rail Services Act of 1981 to be unconstitutional, or upon a petition for a writ of certiorari to review "judgments", gives this Court jurisdiction to review an interlocutory order which is not based on a finding that a portion of the Act is unconstitutional.
2. Whether a statutory provision, 45 U.S.C. §588, which requires a neutral referee to devise the procedure for the transfer of employees from a railroad to a commuter authority, while considering changes in operating practices which would result in greater productivity to the maximum extent practicable and preserving seniority rights to the extent possible, prohibits any modifications in the existing seniority system.
3. Whether a seniority system awarded in accordance with 45 U.S.C. §588 is in violation of civil rights laws where there is no evidence of discriminatory impact or of discriminatory intent.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
COUNTER-STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT:	
A. This Court lacks jurisdiction to grant a writ of certiorari because the order of the Special Court is not final	8
B. A writ of certiorari should not issue to review the discretionary decision of the neutral referee determining the procedure for determining seniority of employees transferring to NJTRO	11
C. Because it does not appear in the record that the seniority system ordered will discriminate against minorities and women, no evidence of intentional discrimination was presented, and the seniority system ordered by the neutral referee is a bona fide seniority system in accordance with 45 U.S.C. §588(c)(5), the seniority system is consistent with applicable Civil Rights Laws and decisions of this Court	15
CONCLUSION	16

	PAGE
APPENDIX:	
Order by Special Court for Expedited Determination of a Portion of the Petition for Review	1a
Cross Motion for Preliminary Injunction	3a
Portion of Factual Presentation in Support of NJT Rail Motion for Award of Implementing Agreement—Operating Employees	5a
Portion of Arbitration Opinion and Awards, October 14, 1982	15a
Affidavit of Frank J. Flynn	17a
Affidavit of Robert O'Neill	21a

Table of Authorities**Cases Cited**

American Tobacco Co. v. Paterson, — U.S. —, 71 L. Ed. 2d 748 (1982)	15
New Jersey Transit Rail Operations, Inc. v. International Brotherhood of Boilermakers, etc., 550 F. Supp. 1327 (Special Ct. 1982)	5, 12, 13
Philbrook v. Glodgett, 421 U.S. 707 (1975)	11
Pullman-Standard v. Swint, — U.S. —, 72 L. Ed. 2d 66 (1982)	16
Rice v. Sioux City Cemetery, 349 U.S. 70 (1954)	14
Union Pacific Railroad Company v. Sheehan, 439 U.S. 89, reh. den. 439 U.S. 1135 (1978)	14

Statutes Cited

28 U.S.C.:	
Sec. 1252	10
45 U.S.C.:	
Sec. 588	Passim
Secs. 588-590	Passim
Sec. 589	2, 12
Sec. 590	3, 12
Sec. 701 <i>et seq.</i>	10
Sec. 719(e)(3)	9
Sec. 744(c)	2
Sec. 744a	2
Sec. 1105	9

TABLE OF AUTHORITIES

v

Rule Cited	PAGE
Rules of Supreme Court, Rule 18	10
 Other Authorities Cited	
127 Cong. Rec. S.9062 (July 31, 1982)	12, 13
12 Moore's Federal Practice ¶461.01(1)	10

NO. 82-1189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED TRANSPORTATION UNION,

Petitioner,

vs.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY, *et al.*,

Respondents.

**On Petition for a Writ of Certiorari to the Special Court,
Regional Rail Reorganization Act of 1973**

BRIEF IN OPPOSITION

Counter-Statement of the Case

This matter comes before the Court on a Petition for a Writ of Certiorari of the United Transportation Union to review an interlocutory order of the Special Court (created pursuant to the Regional Rail Reorganization Act of 1973) denying a preliminary injunction sought by

petitioner. The preliminary injunction sought was for an Order restraining respondent, NJ Transit Rail Operations, Inc.* (NJTRO), from using the seniority roster established by the award of a neutral referee pursuant to §508 of the Rail Passenger Service Act, 45 U.S.C. §588.

This matter arises under certain provisions of the Northeast Rail Services Act of 1981 (NRSA) (Pub. L. 97-35, Title XI, §§1131-1168, August 13, 1981) amending the Rail Passenger Service Act to add §§508-510 providing for the transfer of employees from the Consolidated Rail Corporation (Conrail) to commuter authorities. 45 U.S.C. §§588-590. These provisions were necessitated by another provision of NRSA providing that "notwithstanding any other provision of law or contract, Conrail shall be relieved of any legal obligation to operate commuter service on January 1, 1983." 45 U.S.C. §744a. Prior to that date, Conrail had been required to operate commuter service under contracts with commuter authorities pursuant to §304(c) of the Regional Rail Reorganization Act of 1973. 45 U.S.C. §744(c).

45 U.S.C. §§588-590 provided a three-step process for transferring employees from Conrail to commuter authorities. First, a factfinding process was to be completed in order to recommend "changes in operating practices and procedures which would result in greater productivity to the maximum extent practicable." 45 U.S.C. §589. The second step was the negotiation of Implementing Agreements to determine the number of employees and to identify the specific employees to be transferred to commuter authorities. 45 U.S.C. §588. Those negotiations were to be held between commuter authorities and repre-

* The legal name of respondent. Petitioner improperly named respondent in both its petition below and the instant petition.

representatives of the various crafts or classes of employees of Conrail to be transferred to commuter authorities. If the negotiations did not result in an agreement by August 1, 1982, the dispute was to be submitted to a neutral referee for binding arbitration. 45 U.S.C. §588(d). The transfer of employees was to be completed by January 1, 1983. The final step in the process is the negotiation of a collective bargaining agreement with representatives of the crafts or classes to be transferred to the commuter authority. 45 U.S.C. §590.

The instant dispute arises out of an Implementing Agreement awarded by a neutral referee after NJTRO and the various unions representing employees to be transferred to NJTRO were unable to reach an agreement pursuant to 45 U.S.C. §588 (Pa12).^{*} One of the neutral referee's tasks in determining the Implementing Agreement for the transfer of employees from Conrail to NJTRO, pursuant to that provision, was to:

determine the procedure for determining the seniority of such employees in their respective crafts or classes in Amtrak Commuter or with a commuter authority which shall, to the extent possible, preserve their prior seniority rights.

45 U.S.C. §588(c)(5). Pursuant to the existing Conrail collective bargaining agreements, Conrail employees performing the same function were restricted from bidding on positions outside existing seniority districts, which were based on the operating territories of Conrail's predecessor railroads. For the trainmen who are represented by the UTU there are five such seniority districts based

^{*}"Pa" refers to the Appendix attached to the Petition for a Writ of Certiorari. "Ra" refers to the Appendix attached to this brief.

on the old operating territories of the Erie, the Lackawanna, the Penn Central, the Reading and the Central Railroad of New Jersey railroads (Ra5-Ra6). However, NJTRO's commuter operations are administered as a single system (Ra14); the operating territories of the predecessor railroads are in close geographic proximity to one another. In its submission to the neutral referee, NJTRO showed that the use of the old seniority districts would impinge on operational flexibility and efforts to reduce costs (Ra7-Ra14).

After considering the arguments of the parties Neutral Referee Kasher found that:

In our Opinion the statute does not mandate retention of prior rights on the commuter authority. "To the extent possible" requires, in our Opinion, recognition of the prior rights principles, while at the same time, establishing a seniority system that NJTRO, as a new carrier, can administer properly and fairly.

Accordingly, we have used the concepts of prior rights to determine initial bidding entitlements and identified the number of assignments attached to the prior rights seniority district for order selection list purposes. However, once the order selection list has been established, NJTRO employees will have their seniority rights determined on the basis of their last date of hire, without a break in service, with Conrail or a predecessor carrier. The awards ensure all prior and prior prior rights on Conrail. (Ra16)

Thus, the neutral referee mandated a two-step process in order to determine which trainmen would transfer to NJTRO and their seniority after the transfer has oc-

curred. First, an Order Selection List was developed by alternating employees from each district on the basis of their level of seniority within their respective districts and the number of employees within each district (Pa13). After employees were transferred, however, seniority was determined in accordance with the years of employment with their prior employers, but was not based on the relative position of employees on the seniority rosters for the old seniority districts (Pa14). Petitioner asserts to this court, as it did below, that the above process will have a discriminatory impact on minorities and women. However, contrary to the claim in petitioners statement of facts that the assertions in the affidavits of Charles R. Jones and Suzanne Woodard are not substantially disputed, Robert O'Neill and Frank Flynn explained the fluid nature of the selection process, so that at the time of the hearing below it was unclear who the employees to be transferred were. (Ra17-Ra27)

The neutral referee's award was made on October 14, 1982. NJTRO filed an appeal of a portion of that award on October 19, 1982, *New Jersey Transit Rail Operations, Inc. v. International Brotherhood of Boilermakers*, 550 F. Supp. 1327 (Spec. Ct. 1982), which appeal was fully adjudicated by the Special Court by November 5, 1982. On November 12, 1982 petitioner filed a Petition for Review questioning three aspects of the award of Neutral Referee Kasher and also questioning four aspects of an award issued in arbitration between the UTU and the South-eastern Pennsylvania Transportation Authority (Pa15). Upon the motion of Conrail, the Special Court ordered an expedited determination of paragraph 18(a) of the UTU's Petition for Review (Ra1). Paragraph 18(a) was that portion of the petition challenging the use of the seniority roster required by the award of Neutral Referee Kasher (Pa16). Following the Order expediting consideration, on

December 10, 1982, petitioner filed a cross-motion requesting a preliminary injunction enjoining the use of the seniority roster required by the Kasher award (Ra3). Argument on the cross-motion and the expedited consideration was heard by the Special Court on December 17, 1982.* Noting that petitioner had a heavy burden of proof to succeed in setting aside the neutral referee's award, the Special Court denied the preliminary injunction on the ground that petitioner was unlikely to succeed on the merits (Pa3). The court also held that the public interest would not be served by any delay or disruption in the orderly transfer of employees from Conrail to NJTRO by January 1, 1983, as mandated by 45 U.S.C. §588(c) (6).** No judgment has been entered in this matter and the court has not filed an opinion.*** In addition, no action has been taken by the Special Court with respect to any of the other aspects of the Kasher award that were challenged by petitioner nor with respect to any aspects of the SEPTA award which were challenged in the petition for review before the Special Court.

* On that same day, a motion for intervention was filed on behalf of Suzanne Woodward, *et al.* challenging the Kasher award on the grounds that it discriminated against minorities and women. The motion to intervene was granted on January 21, 1983.

** Intervenors sought a stay from the Special Court of the denial of the preliminary injunction. As the motion for intervention had not been granted at that point, the Special Court did not rule on the motion for a stay. Thereafter, an application for stay was filed with this Court. (Docket No. A-614). That application was denied in a January 20, 1983 order.

*** Petitioner included in its Appendix a final order in *United Transportation Union v. Metro-North* (Spec. Ct., No. 82-25, Dec. 21, 1982) (Pa5). That is not an order in this matter.

Summary of Argument

A review of the statute upon which petitioner relies for jurisdiction, 45 U.S.C. §1105(b), reveals that it does not grant this Court jurisdiction to review interlocutory orders of the Special Court, where the order is not based on a finding that a provision of the Northeast Rail Service Act of 1981 is unconstitutional or invalid.

Petitioner seeks review of an award of a neutral referee made pursuant to a statute, 45 U.S.C. §588, which grants broad discretion to the referee to prescribe a procedure for transferring employees from Conrail to commuter agencies. The scope of review of that award is extremely narrow, being limited to a determination as to whether the referee failed to comply with the law, acted outside his jurisdiction, or acted corruptly. The arguments made by petitioner challenging the award are without merit and do not raise an important question of federal law.

Petitioner also argues that the neutral referee's award discriminates against minorities and women in violation of various statutory and constitutional provisions. However, that argument is based on facts not established in the record. Moreover, this Court has clearly held that even if a bona fide seniority system has a discriminatory impact, it does not violate laws against discrimination. There must be proof of discriminatory intent. No such proof has been shown in this matter.

ARGUMENT

- A. This Court lacks jurisdiction to grant a writ of certiorari because the order of the Special Court is not final.**

Petitioner requests a writ of certiorari to review an order denying preliminary injunctive relief only. Although petitioner states in the conclusion to its petition for a writ of certiorari that it seeks review of the judgment of the Special Court, no judgment has yet been rendered by the Special Court. Therefore this Court lacks jurisdiction to grant the relief sought.

Petitioner argues that §1152(b) of NRSA, 45 U.S.C. §1105(b), gives this Court jurisdiction to review this case on a petition for a writ of certiorari. However, that statutory provision does not give this Court jurisdiction where the action of the Special Court is not final. Under 45 U.S.C. §1105(b), provision is made for review by this Court of Special Court decisions under two circumstances, the first upon petition for a writ of certiorari and the second by direct appeal. The relevant portions of 45 U.S.C. §§1105(a) and (b) are as follows:

(a) Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action—

(1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this chapter, or administrative action taken thereunder to the extent such action is subject to judicial review;

• • •

(b) A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision of this subtitle shall be reviewable by direct appeal to the Supreme Court of the United States. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment.

• • •

The above provision makes a clear distinction between a "judgment" which may be reviewed upon a writ of certiorari and "any *order* or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision" of the act which shall be reviewable by direct appeal (emphasis supplied). The use of the word "order" in the second portion of the section, but not in the first, must be construed to give this Court broader jurisdiction where it is used. Where the Special Court finds a provision of the statute is unconstitutional or invalid, this Court has been given jurisdiction to review interlocutory orders as well as judgments by direct appeal. Where the issue is merely interpretation of the statute or the correctness of its implementation, this Court has jurisdiction to review only a final "judgment."

Since 45 U.S.C. §1105 sets forth the exclusive method of review of Special Court actions referred to in that section, reliance upon any other provision of law to argue the reviewability of interlocutory orders would be misplaced. This is consistent with Professor Moore's interpretation of 45 U.S.C. §719(e)(3) which established

criteria for reviewability of Special Court decisions under the Regional Rail Reorganization Act of 1973, 45 U.S.C. §701 *et seq.* In considering whether 28 U.S.C. §1252, which authorizes an appeal from a judgment of "any court of the United States" in certain cases in which a federal statute has been held to be unconstitutional, could embrace judgments of the Special Court, Professor Moore concluded that "the better view is that the special methods for review enumerated in the Rail Act itself are exclusive, and that §1252 does not supplement the provisions of the Rail Act for Supreme Court review of orders or judgments of the Special Court." 12 Moore's Federal Practice ¶461.01[1]. Therefore, because 45 U.S.C. §1152(b) provides the exclusive basis for jurisdiction to review orders of the Special Court, this Court lacks jurisdiction to review an interlocutory order that is not based on a finding that a portion of NRSA is unconstitutional.*

Moreover, as no opinion has been issued by the Special Court, the precise grounds for the Special Court's ruling

* Even if the Court were to find that 45 U.S.C. §1105(b) gives it jurisdiction to review an interlocutory order which does not hold NRSA or any portion thereof unconstitutional, such a writ is not appropriate in this matter, because there has been no showing that this case requires deviation from normal appellate practice. Rule 18 of this Court provides that:

"a writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court."

Although the above rule is not strictly applicable to this matter as it deals with cases pending in the court of appeals, the rationale is clearly pertinent. Therefore, in the absence of the requisite showing, certiorari should be denied.

cannot be determined. Indeed NJTRO made arguments below that have yet to be addressed by the Special Court. Specifically, it was argued that the petition for review is barred by the compulsory counterclaim rule because petitioner failed to make its arguments to the Special Court at the time that NJTRO petitioned the Special Court to review the same award that is the subject of this matter. In addition, it was argued that petitioner's claim was barred by laches in view of the January 1, 1983 deadline for transfer contained in 45 U.S.C. §588(c)(6). Because the Special Court has yet to rule on these issues it is premature to issue a writ of certiorari to review the denial of the preliminary injunction.

B. A writ of certiorari should not issue to review the discretionary decision of the neutral referee determining the procedure for determining seniority of employees transferring to NJTRO.

Straining to find an inconsistency between the Special Court's denial of the preliminary injunction and decisions of this Court, petitioner argues that the Special Court decision conflicts with the general rule of statutory construction requiring a court to give effect to the ordinary meaning of words used in a statute. However, in taking the phrase "to the extent possible" out of context it is petitioner that has ignored the requirement that, in interpreting a statute, the court should "look to the provisions of the whole law and its object and policy." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

In its petition to this Court, the UTU argues, as it did below, that the provision in 45 U.S.C. §588(c)(5), requiring the preservation of prior seniority rights "to the extent possible," gives the neutral referee no dis-

cretion and requires the maintenance of precisely the same seniority rights that existed with Conrail. That argument ignores the statutory framework. In this case the provision for an Implementing Agreement was a second step in the process prescribed in 45 U.S.C. §§588-590 "prescribing the method under which Conrail employees are to be absorbed by Conrail's successors." *New Jersey Transit Rail Operations, Inc. v. International Brotherhood of Boilermakers, etc.*, 550 F. Supp. 1327, 1328 (Special Ct., 1982). The Implementing Agreement follows the findings of the factfinding panel appointed pursuant to 45 U.S.C. §589, to recommend "changes in operating practices and procedures which would result in greater productivity to the maximum extent practicable." Thus, it is indisputable that Congress envisioned consideration of improvements in operating practices when a determination was made regarding the transfer of employees. Further, 45 U.S.C. §590 provides for the negotiation of new collective bargaining agreements after the Implementing Agreements are reached. In so doing Congress intended that:

Existing Conrail agreements would not apply to Amtrak Commuter or coramuter authorities that choose to operate their own service.

Explanatory Statement, 97th Cong., First Sess., 127 Cong. Rec. S. 9062 (July 31, 1981). Thus, commuter authorities are not bound by seniority provisions in existing collective bargaining agreements. When the statute is read as a whole it shows that Congress intended the maintenance of existing seniority rights to be one, but not the paramount, goal to be achieved in designing the Implementing Agreement. Also to be considered were improvements in productivity.

Thus, when Congress provided that existing seniority rights should be preserved, "to the extent possible," it meant to maximize the preservation of such rights only to the extent that such preservation could be done while also maximizing productivity gains. Indeed, that purpose of the labor provisions of NRSA can be found in the statement of the Senate Conferees.

The Implementing Agreement provided for in a new Section 508 of the Rail Passenger Service Act is designed to provide for an orderly transfer of employees from Conrail to Amtrak Commuter or the commuter authorities. The conferees note their intent to provide for maximum flexibility to the employees and employers involved by providing generally for the retention of seniority rights. . . .

• • •

The factfinding panel should look at a variety of changes which may improve productivity, *such as flexibility in employee assignments* and ensuring an appropriate number of employees for particular tasks. (emphasis supplied).

Explanatory Statement, 97th Con., First Sess., 127 Cong. Rec. S. 9062 (July 31, 1981). As explained in the NJTRO presentation to the neutral referee, the use of a single seniority district is necessary to obtain such flexibility. The undisputed evidence presented by NJTRO showed that a single seniority district would result in significant operational savings and efficiency. Those efficiencies provided the basis for the neutral referee's Award. Thus, the Award changing the seniority system to provide for one seniority district is consistent with the statute.

In *New Jersey Transit Rail Operations, Inc. v. International Brotherhood of Boilermakers, etc., supra*, at 1329,

the Special Court recently discussed the standard for judicial review of an arbitrator's award pursuant to 45 U.S.C. §588. Recognizing that 45 U.S.C. §588(d)(3) states that the award is to be "final and binding to the same extent as an award of an adjustment board under Section 3 of Railway Labor Act," the Special Court followed decisions of this Court stating the standard of review under that statute:

Judicial review of arbitrators' determinations under that Act is very limited. In *Union Pacific Railroad Company v. Sheehan*, 439 U.S. 89, reh. den. 439 U.S. 1135 (1978), the Supreme Court held that in order to overturn such a decision there must be a showing either that the arbitrator failed to comply with the Act's requirements, failed to act within his jurisdiction or acted corruptly. 439 U.S. at 93.

The Court may not substitute its opinion for that of the referee. *Id.* at 1331. The above standard of review was used by the Court in denying the preliminary injunction. Because broad discretion was granted to the Referee and the transfer process is a one-time event that will not be repeated, this issue does not raise an important question of federal law so as to merit the granting of a writ of certiorari. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1954).

C. Because it does not appear in the record that the seniority system ordered will discriminate against minorities and women, no evidence of intentional discrimination was presented, and the seniority system ordered by the neutral referee is a bona fide seniority system in accordance with 45 U.S.C. §588(c)(5), the seniority system is consistent with applicable civil rights laws and decisions of this Court.

Initially, the Court should recognize that because no judgment has been entered or opinion written by the Special Court, the reasons of that Court for rejecting petitioner's, as well as intervenor's, arguments that the award would illegally discriminate against minorities and women are not known. Therefore, a writ of certiorari to review that determination would be premature. Petitioner relies on affidavits of Charles Jones and Suzanne E. Woodard to the effect that the award of the neutral referee would result in an all male work force and would virtually eliminate all minority employees. However, as was explained in the affidavits of Frank J. Flynn and Robert O'Neill, at the time of the hearing below the effect of the award on all employees, including minorities and women, could not be determined. Thus, not even a discriminatory impact of the award could be shown. Even if there was such an impact, as 45 U.S.C. §588 clearly envisioned recognition of existing seniority rights, such an impact cannot be found to be in violation of congressional intent.

Moreover, this Court has clearly ruled that, for a seniority system to be in violation of Title VII of the Civil Rights Act, a plaintiff must show an intent to discriminate. *American Tobacco Co. v. Paterson*, — U.S. —, 71 L. Ed. 2d 748 (1982). Petitioner has cited no evidence of such discriminatory intent in this case. In fact, there is no evidence that Neutral Referee Kasher had any discriminatory

intent when he issued his award, or that he was aware of the alleged discriminatory impact. This Court recently held that:

[d]iscriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive.

Pullman-Standard v. Swint, — U.S. —, 72 L. Ed. 2d 66, 81 (1982). In this case there has been no evidence of such actual motive. It is, therefore, clear that there has been no violation of Title VII of the Civil Rights Act of 1964.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

**Order by Special Court for Expedited Determination
of a Portion of the Petition for Review**

(Filed—December 9, 1982)

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Section 1152 Panel

C.A. No. 82-25

UNITED TRANSPORTATION UNION,

Petitioner,

v.

**SOUTHEASTERN PENNSYLVANIA TRANSPORTA-
TION AUTHORITY, NEW JERSEY RAIL OPERA-
TIONS, INC.,**

Respondents,

and

CONSOLIDATED RAIL CORPORATION,

Rule 19 Party.

**Upon consideration that Consolidated Rail Corporation
("Conrail") filed a Motion for Expedited Determination**

*Order by Special Court for Expedited Determination
of a Portion of the Petition for Review*

of paragraph 18(a) of the Petition of the United Transportation Union for Review so that Conrail will be able to initially award positions under Referee Kasher's award, and that all parties had an opportunity to file written objections, and no written objections have been filed,

IT IS ORDERED that Petitioner United Transportation Union file any pleadings in support of paragraph 18(a) of its Petition for Review, and deliver any such pleadings to each judge of the §1152 Panel and counsel for all parties, not later than December 10, 1982; and,

IT IS FURTHER ORDERED that any replies or objections to the Petitioner's pleadings in support be filed and delivered to each judge of the §1152 Panel and counsel for all parties not later than December 15, 1982; and,

IT IS FURTHER ORDERED that oral argument on paragraph 18(a) of the Petition for Review, if deemed necessary by the Court, shall be on December 17, 1982 at a time and location to be established by further order of the Court.

Richard E. Eriksen
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For the Court

December 9, 1982

Cross Motion for Preliminary Injunction
SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973
Civil Action No. C.A. 82-25

UNITED TRANSPORTATION UNION,
Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTA-
TION AUTHORITY, NEW JERSEY RAIL OPERA-
TIONS, INC.,

Respondents,

and

CONSOLIDATED RAIL CORPORATION,

Rule 19 Party.

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, petitioner, United Transportation Union [hereinafter, "UTU"] respectfully moves this Court for a preliminary injunction restraining respondent, New Jersey Rail Operations, Inc. [hereinafter, "NJT"], its officers, assigns, agents, employees, and any person or entity acting under contract on its behalf from changing the seniority order (the G roster) of the UTU membership as it pres-

Cross Motion for Preliminary Injunction

ently exists on Consolidated Rail Corporation [hereinafter, "Conrail"].

Respectfully submitted,

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**Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees**

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.

**A Subsidiary of
NEW JERSEY TRANSIT CORPORATION**

October 1, 1982

• • •

***B. Separate Operating Craft Seniority Districts
Must Be Consolidated***

It is misleading to speak of one Conrail—New Jersey labor force, for in fact there are many. These forces operate, in many respects, almost as they did prior to the formation of Conrail. Most importantly, many separate labor agreements between the bankrupt railroads which preceded Conrail and individual crafts and classes of operating employees still survive. Section 504(d) of the 3R Act contemplated negotiation of single collective bargaining agreements for Conrail employees. This has yet to be accomplished for operating employees. Resolution of prior right claims has been one of the principal stumbling blocks.

Consequently, separate district seniority rosters which reflect the operating employees' prior rights on the predecessor bankrupt railroads are still maintained (hereafter

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees*

"prior rights").⁴ See Figure No. 1. Conrail's seniority districts in New Jersey for the operating crafts are as follows:

Penn Central. Employees of the former Penn Central have seniority on the Northeast Corridor Line and the North Jersey Coast Line electric service. The employees of the former Penn Central are the only group with the right to operate into New York City.

Central New Jersey. Employees of the former Central New Jersey have seniority on the North Jersey Coast Line diesel service, Raritan Valley and the West Trenton Line. All of these lines terminate in Newark.

Reading. Employees of the former Reading Railroad have seniority on the West Trenton Line from the West Trenton station to the Calco station.

Lackawanna. Employees of the former Lackawanna railroad have seniority on the Gladstone Line, Montclair Branches, Morristown and Boonton Lines, all of which terminate in Hoboken. These

⁴ "Prior rights" are the seniority rights accumulated on the bankrupt railroads which were carried over to Conrail by the bankrupt railroad employees who became employees of Conrail. Some of the bankrupt railroads, such as the Erie-Lackawanna, were products of earlier railroad mergers. Many of the bankrupt railroads had employees whose employment preceded the earlier mergers, and who had accumulated seniority on the pre-merger railroads. These seniority rights survived the merger, and indeed were carried over into Conrail. These early seniority rights are referred to as "prior prior rights."

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees*

employees also have seniority on the Main Line from Patterson station to Hoboken.

Erie. Employees on the former Erie railroad have seniority the Pasack Valley, Bergen and Main lines, and on the Boonton Line from the Mountain View station to Hoboken. All of these lines terminate in Hoboken.

There are several instances where the seniority districts overlap. For example, employees from the former Penn Central and CNJ both work on the New Jersey Coast Line. Employees from the former CNJ only operate as far as Newark, with employees from the former Penn Central operating into New York City. Similarly, Erie and Lackawanna employees both work and hold prior seniority rights on different portions of the Boonton and Main Lines.

1. Commingling And The Elimination Of Seniority Districts Based On Pre-Conrail Railroads Will Improve Operation Of Existing Commuter Rail System

There are almost no interchangeable rights among the groups of employees with separate seniority districts. Each group holds "prior rights" to operate trains on the lines within its own seniority district. Under current seniority district limitations, an employee's assignment must be limited to the locale historically serviced by the bankrupt railroad which employed the operating employee. Accordingly, Conrail cannot post assignments which combine duties in territories covered by separate

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees*

seniority districts. For example, although former CNJ and Penn-Central trains both serve Newark's Penn station, an engineer assignment cannot be posted which contains duties on both runs. The same is true with respect to former Erie and former Lackawanna runs. Commingling of service would eliminate these artificial distinctions.

Consolidation of the operating crafts' separate seniority rosters and the implementation of commingling will improve commuter rail service because it will permit NJT Rail to post assignments which reflect the unitary nature of commuter rail service in the state of New Jersey.

First, commingling will improve scheduling for riders. The restrictions imposed by multiple seniority districts limits the rail services available to commuters. For example, as noted earlier, employees of the former Penn Central and CNJ both work and hold "prior rights" on portions of the North Jersey Coast Line. This occurred in 1967 when the CNJ trains on the North Jersey Coast Line were rerouted to Newark to permit CNJ trains to operate for the first time on Penn Central tracks between Perth [sic] and Newark. The respective railroads agreed the CNJ railroad would not pick up passengers at stations historically served by the Penn Central.

After consolidation of these railroads in Conrail, these distinctions should have become wholly meaningless. Yet Conrail has been unable to negotiate new agreements under section 504 of the 3R Act. Consequently, in 1980, when NJT tried to arrange for a new summer rail service on the North Jersey Coast which could collect passengers from all stops on the route between Newark and South Amboy,

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees*

it could not obtain concurrence among local union committees to permit the trains operated by former CNJ employees to make those stops. As a result, Jersey Shore riders have had to wait longer for trains, received more limited service, and have been generally inconvenienced.

Similarly, scheduling on the Boonton Line is constrained because former Lackawanna employees are precluded from stopping between Mountain View and Hoboken on the Boonton line. These stations were historically served by the Erie railroad.

Second, commingling will increase the productivity of the operating employees and reduce the number of crews required to provide commuter rail service. This possibility is best illustrated by reference to the operation and staffing of the Newark Division, with its separate seniority rosters for former Penn Central and CNJ employees.

Under the current system of separate seniority districts with their distinct assignments, 85 crews consisting of 334 employees are required to operate the Newark Division over a seven day period; 85 engineers, 78 conductors, and 181 other trainmen. 63 crews are required on a typical workday. The multiple seniority districts produce overstaffing of the commuter rail system in two ways. As noted earlier, train crews are presently unable to stop at all stations on the lines on which they operate. Second, inability to commingle work in a single assignment interferes with management's need to develop a rail operating plan consistent with the needs of the commuter system. The existing seniority districts act as artificial barriers to the efficient allocation of manpower, thus unnecessarily increasing the number of crews and deadheading time.

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees*

Commingling will increase the productivity of the train crews. A more efficient allocation of operating employees within the commuter system will reduce the amount of time employees spend deadheading and laying over between operating trains. Practice under Conrail often requires either the crews awaiting a particular train's scheduled departure or a train being scheduled merely to accommodate the movement of the crew.

With the implementation of unified seniority districts and commingled assignments, the consolidation of current seniority rosters, NJT Rail estimates that the Newark district could be operated with only 54 crews on a typical weekday. Although only an estimate, this reduction of 9 crews or 32 operating positions could result in an annual savings of more than \$1.2 million. Such productivity improvements and savings are not limited to the Newark district, and must not be overlooked during this period of fiscal adversity.

*2. Commingling And The Consolidation Of Seniority
Districts Is Essential To Realize The Value of NJT's
Capital Improvement Program*

In order to increase ridership and to streamline operations, NJT and the federal government have long recognized that it is essential to turn the component lines of the North Jersey rail system into a unified and coordinated whole. Nearly a billion dollars has been or will be spent to this end. Irrespective of prior, or prior prior rights, trains must be permitted to be re-routed so that they may service major destination points not cur-

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees*

rently served. If duplicative crews or penalty payments were required when a train left one seniority district and entered another, this investment would largely be wasted. A description of the capital projects completed and underway will make clear the compelling need to eliminate the suffocating effect of the existing multiple seniority districts on the system.

Kearny Connection

As has been explained previously, the North Jersey commuter rail system is divided into two separate and unconnected operating districts: the Hoboken district, and the Newark district.

While most commuters in the Newark district have direct access through Penn Station (Newark) to mid-town New York, the same is not true for riders on the Hoboken district. Midtown Manhattan commuters on the Hoboken district's Morristown lines are now required to make a very inconvenient connection at Hoboken Station to PATH midtown service. Passengers are required to walk to the PATH terminal, await the next subway service and then spend an additional 15-20 minutes reaching midtown New York.

In recognition of this problem, the State of New Jersey is expending more than \$400 million in federal and state funds to re-electrify the Morristown line (Lackawanna seniority roster) so that its traction system is basically compatible with the Northeast Corridor (Penn Central seniority roster). In anticipation of the 1983 completion of the re-electrification project, NJT Rail Staff have ac-

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees*

tivated plans for the \$55 million construction of a connection in Kearny to create a physical link between these lines and afford the Morristown line ridership direct rail access into Penn Station, New York.

Prior rights could thwart the effectuation of the Kearny Connection by blocking Lackawanna crews from serving Penn Station, New York, or requiring a costly change of crews between Kearny and New York City. Seniority rosters for the new NJT Rail Commuter rail operation must be merged so that important improvements such as this can be carried out without undue cost or institutional friction.

Montclair Connection

Even though the tracks of the Montclair branch of the Morristown line and the tracks of the Boonton line pass within 2000 feet of each other in Montclair, they do not in fact connect. Rather, the Boonton tracks bypass downtown Newark altogether, terminating in Hoboken, while the Montclair branch stops at Newark's downtown Broad Street terminal.

At the cost of \$15-20 million dollars, NJT Rail plans to connect the Boonton line and Montclair branch in Montclair, which would afford Boonton riders access to downtown Newark and would promise operating savings.

Again, the continued existence of seniority districts between the Erie (Boonton) and Lackawanna (Boonton and Montclair Branch) rosters could thwart this project. Under existing rules, trains and crew from the Erie roster cannot travel on the Montclair Branch.

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees*

Meadows Shop

At the cost of approximately \$90 million dollars, NJT Rail is in the process of building a new "state of the art" consolidated maintenance facility in the Meadows yards in Kearny, New Jersey. When that facility is completed, NJT Rail will be able to close antiquated and obsolete facilities and consolidate servicing, inspection, repair and overhaul operations for its entire commuter rail system at its Meadows Shop.

One of the great advantages of the New Meadows Shop will be its central location, easily accessible to all North Jersey lines of the system. Unfortunately, because of that central location, it will be necessary for virtually all crews to use "foreign" track to bring equipment to the shop. For example, Penn Central crews will be required to travel on Erie Lackawanna track and vice-versa. It is important that many of the logistical advantages of this important new facility not be lost on account of special crewing rules dictated by current seniority districts.

New Jersey Coast Line Electrification

On the North Jersey Coast line, crew with prior Penn Central rights have historically operated an electric service from South Amboy to Penn Station, New York and diesel/electric service from Bay Head to Penn Station, New York, while since 1967 former CNJ crews operate the diesel service from Bay Head to Newark. As noted earlier, the CNJ crew cannot stop at stations between South Amboy and Newark, since Penn Central crew have prior rights there.

*Portion of Factual Presentation in Support of NJT Rail
Motion for Award of Implementing Agreement—
Operating Employees*

At cost of \$130 million, NJT Rail has extended electrified service from South Amboy to Matawan and expects to invest an additional large sum to extend electrified service to Long Branch. The extension to Long Branch would effect a major schedule revision and severely disrupt the historic balance between the Penn Central and CNJ seniority districts. The further extension of electrification on the North Jersey Coast line will be unduly complicated, if not delayed or harmed, without a merger of seniority districts and the ability to post assignments which cross old railroad property distinctions at the outset of NJT Rail operations. Under the current system NJT Rail institutes new operations at its peril, risking discord and time claims based on conflicting claims as to seniority rights to the new assignments.

In summary, New Jersey is in fact a single commuter rail system. But the existence of archaic seniority districts which have evolved over a hundred years on five defunct railroads has forced it to operate as many separate sub-systems rather than as a unified whole. Multiple seniority districts must be replaced with one district for trainmen and for enginemen. While a person's seniority on a predecessor railroad cannot be ignored, it cannot be used to hinder the right of NJT Rail to manage the State's commuter service in a unitary manner. It is partly in recognition of the substantial service and cost benefits of a unified system that the State of New Jersey has committed huge capital expenditures to the rail transit system. If the cost and service benefits of investment are not realized due to the continued existence of multiple seniority districts and if other important improvements in operation are slowed, the resulting loss of public confidence and support will weigh heavily on both the system and on its employees.

**Portion of Arbitration Opinion and Awards,
October 14, 1982**

**IMPLEMENTING AGREEMENTS ARBITRATION
PURSUANT TO SECTION 508 OF THE RAIL
PASSENGER SERVICE ACT, AS AMENDED**

**IN THE MATTER OF AN ARBITRATION AMONG
NEW JERSEY TRANSIT RAIL OPERATIONS, INC.**

and

CONSOLIDATED RAIL CORPORATION

and

**THE LABOR ORGANIZATION REPRESENTATIVES
OF THE INVOLVED CRAFTS AND CLASSES OF
EMPLOYEES**

3. *Prior Rights*

The operating crafts organizations have sought full implementation of the concept of prior rights on NJTRO. Section 508(c)(5) speaks in terms of preserving employees' prior seniority rights on NJTRO, "to the extent possible." On the other hand, Section 508(c)(7) provides that these same employees shall have their prior rights on Conrail ensured.

Portion of Arbitration Opinion and Awards
October 14, 1982

In our Opinion the statute does not mandate retention of full prior rights on the commuter authority. "To the extent possible" requires, in our Opinion, recognition of the prior rights principle, while, at the same time, establishes a seniority system that NJTRO, as a new carrier, can administer properly and fairly.

Accordingly, we have used the concept of prior rights to determine initial bidding entitlements and identified the number of assignments attached to the prior right seniority districts for order selection list purposes. However, once the order selection lists have been established, NJTRO employees will have their seniority rights determined on the basis of their last date of hire, without a break in service, with Conrail or a predecessor carrier. The Awards ensure all prior and prior prior rights on Conrail.

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Affidavit of Frank J. Flynn

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Section 1152 Panel

Civil Action No. 82-25

UNITED TRANSPORTATION UNION,

Petitioner,

v.

**SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY, *et al.*,**

Respondents.

FRANK J. FLYNN, of full age, being duly sworn upon his oath deposes and says:

1. I am the Regional Manager of the New Jersey Commuter Region of the Consolidated Rail Corporation (Conrail). In that position I report directly to R. C. Sullivan, Vice President-Passenger Operations of Conrail. I have overall responsibility for commuter rail operations in New Jersey which include the operation of more than 500 trains daily. I supervise all operating, maintenance of equipment, maintenance of way, police and public relation employees in the New Jersey Commuter Region. In my posi-

Affidavit of Frank J. Flynn

tion as Regional Manager I also have responsibility for coordinating efforts for the posting and awarding of positions in the Region, with personnel in Conrail's labor relations department.

2. Effective January 1, 1983 I will become the Assistant Vice President-Operations of the New Jersey Transit Rail Operations, Inc. (NJTRO) which will be taking over all commuter rail operations in New Jersey from Conrail on January 1, 1983, pursuant to the provisions of the Northeast Rail Services Act of 1981. In the position of Assistant Vice President-Operations I will have substantially the same responsibilities I presently hold as Regional Manager of the New Jersey Commuter Region for Conrail.

3. I have had responsibility for assisting in the coordination of efforts for a smooth orderly transfer of operational responsibility from Conrail to NJTRO on January 1, 1983. Included in that responsibility has been those efforts directed at transferring the employees from Conrail to NJTRO.

4. In accordance with the Implementing Agreement awarded by Richard Kasher pursuant to Section 508 of the Rail Passenger Service Act, on or about November 2, 1982 Conrail posted notices advising employees that commuter rail positions in New Jersey would be transferred to NJTRO effective January 1, 1983. On November 22, 1982 Conrail posted notices advising employees that they could bid on those positions to be transferred to NJTRO. All bids were received by December 2, 1982 and Conrail employees have been working to review those bids so that the positions to be transferred to NJTRO may be awarded. We are making every effort to make those awards on Decem-

Affidavit of Frank J. Flynn

ber 17, 1982. If awards are made on that date, employees will be in their new positions by December 22, 1982.

5. If this Court were to reverse the Implementing Agreement, it would require readvertisement and reawarding of those positions. That effort would take at least 20 days and, therefore, could not be completed prior to January 1, 1983. Specifically, it would take approximately three days to prepare and post the advertisements. There are 578 different assignments which would have to be printed and then mailed to the approximately 45 locations for posting on bulletin boards which the present seniority districts encompass for both passenger and freight service. We are obligated, by the collective bargaining agreement, to post advertisements at every location where train crews go on or off duty. In order to allow for the fact that employees may be on vacation, out sick, or absent from work for some other reason, seven days must be allowed for employees to bid on positions. Once the bids have been received, it will take approximately another seven days review the bids, make and print the awards and mail them so that they may be posted at the appropriate locations. This task is made all the more difficult by the fact that it would have to be accomplished during the holiday season when there are three union holidays for certain employees and many union employees are taking vacations. Once the awards are made, employees must be allowed at least three days notice before they report to their new positions.

6. Any attempt at this time to readvertise and reaward the trainmen positions would play havoc with our efforts at accomplishing a smooth and orderly transition on January 1, 1983. The payroll system is being changed from com-

Affidavit of Frank J. Flynn

puter to a semi-computer manual system. If we don't know the employees who are coming over by that date, it won't be possible to pay employees in a timely manner.

7. I have read Charles P. Jones' affidavit. At pages 7 through 10, he discusses the impact of the Order Selection List on Non-Minority and Minority employees. That discussion misconstrues the nature of that list as it assumes that the 610 trainmen on the list are the same 610 trainmen that will ultimately be transferring to NJTRO. In fact, the same employees also have a right to bid for positions at Conrail, Amtrak and SEPTA. Until the bidding is completed, it will not be known which employees will in fact transfer to NJTRO. Moreover, in view of the fact that the individuals on the Order Selection List have substantial seniority, it is not unlikely that they will choose positions at Amtrak or Conrail which offer higher rates of pay than NJTRO is willing to offer. It is, therefore, not possible at the present time to make a judgment as to what effect the final Order Selection List will have on any employees. Therefore, no judgment can be made concerning what effect the employee transfer provisions will have on minority employees. Until all bids are reviewed and awarded, it cannot be determined where individual employees will be assigned. It is not anticipated that any significant number of employees will be furloughed as a result of the January 1, 1983 transfer. Moreover, any employees furloughed by NJTRO will maintain their existing seniority rights at Conrail.

s/ FRANK J. FLYNN

(Sworn to December 15, 1982.)

Affidavit of Robert O'Neill
SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973
Section 1152 Panel
No. 82-25

UNITED TRANSPORTATION UNION,
Petitioner,

v.

**SOUTHEASTERN PENNSYLVANIA TRANSPORTA-
TION AUTHORITY, NEW JERSEY TRANSIT
RAIL OPERATORS, INC.,**

Respondents,

and

CONSOLIDATED RAIL CORPORATION,

Rule 19 Party.

COMMONWEALTH OF PENNSYLVANIA } ss.:
COUNTY OF PHILADELPHIA

After being duly sworn **ROBERT O'NEILL** deposes and says:

1. I, **ROBERT O'NEILL**, am the Manager-Labor Relations of the Eastern Region of the Consolidated Rail Corporation (Conrail) with offices at Room 420, 30th Street Sta-

Affidavit of Robert O'Neill

tion, Philadelphia, Pennsylvania 19104, and I am authorized to represent Conrail's interest herein and make this affidavit in support of Conrail's Memorandum in Opposition to Petitioner's Motion for a Preliminary Injunction, which Memorandum, to the best of my knowledge and belief, is true and accurate.

*Placement of Conrail Train Service Employees
on NJTRO, SEPTA, and Amtrak Positions*

2. My duties and responsibilities at Conrail include the administration of its collective bargaining agreements in the Eastern Region, and as part of these duties and responsibilities I am responsible for the administration of the arbitrated awards and the implementing agreement which set forth the procedures to be used for Conrail employees to be transferred to and employed by the New Jersey Transit Rail Operations, Inc. (NJTRO), the Southeastern Pennsylvania Transportation Authority (SEPTA) and the National Railroad Passenger Railroad Corporation (Amtrak). The transfers to NJTRO and SEPTA are pursuant to Section 508 of the Rail Passenger Service Act (RPSA), as amended by the Northeast Rail Service Act of 1981 (NRSA), and the Amtrak transfers are pursuant to Section 1165 of NRSA. Included in these responsibilities is the transfer of train service employees in Conrail Seniority District G, who are represented by the United Transportation Union (T&C) (UTU).

3. The arbitrated UTU implementing agreements for SEPTA, as determined by Dr. Quinn, and for NJTRO, as determined by Referee Kasher provide for the establishment of Order Selection Lists of employees that indicate

Affidavit of Robert O'Neill

an interest in employment with either or both the authorities. The implementing agreement among Conrail, Amtrak, and the UTU sets forth procedures for Conrail employees to bid for assignments and become employees of Amtrak. Current Conrail train service employees holding seniority within District G may indicate an interest in employment with one or more of the new employers. The employees who timely indicated an interest in employment with one or more of the commuter authorities initially were placed on the appropriate Order Selection List or Lists. Eligible employees now have had an opportunity to bid on offered positions with all three new employers. When there is an indication that an employee can obtain a position with more than one employer, the employee then is asked to withdraw any duplicative bids requesting employment with other employers. The effect of the employee's withdrawal of duplicative bids is to permit the employee to work for the employer of his choice and prevent the awarding of positions with more than one employer.

Implementation of the NJTRO Implementing Agreement

4. To date, approximately 1,750 hours of Conrail employee time have been utilized to implement the NJTRO Section 508 implementing agreement awards. It is anticipated that approximately 320 additional hours of Conrail employee time will be necessary to complete this task.

5. The arbitrated implementing agreement award which was determined by Referee Kasher pursuant to RPSA Section 508 provides the method by which Conrail employees are selected for transfer to NJTRO. At NJTRO's request, Conrail has agreed to award the initial train service posi-

Affidavit of Robert O'Neill

tions, which are scheduled to be effective on December 22, 1982. Because of the delay due to litigation, the procedures and the dates to implement Referee Kasher's Award, as modified by the parties, are as follows:

A. From November 2, 1982 through November 12, 1982 a special advertising bulletin was posted pursuant to Article II.A of Referee Kasher's Award soliciting written indications of interest from qualified train service employees. 1,766 train service employees submitted such applications.

B. In accordance with Article II.B of Referee Kasher's Award and the Conrail collective bargaining agreement, employees who submitted a written indication of interest pursuant to Article II.A are eligible for inclusion on the NJTRO Order Selection List. The number of employees on the final Order Selection List equals 610, which is the number of employees in NJTRO commuter service on August 1, 1982.

C. The Conrail collective bargaining agreement permits train service employees from Seniority District G to bid on the positions in NJTRO service (hereinafter referred to as "NJTRO Position"). Seniority District G encompasses a geographic area extending approximately from Washington, D. C. to New York City and westward to Harrisburg, Pennsylvania, Sayre, Pennsylvania, and Port Jervis, New York. Train service employees on the Seniority District G roster with prior rights seniority from the Erie Lackawanna (EL), Penn Central (PC), and the Central of New Jersey (CNJ) Railroads have prior rights seniority on NJTRO positions. Additionally, because of the previous mergers of the Lehigh Valley Railroad and the Reading Railroad seniority rosters into the CNJ rosters, certain train service employees from these two predecessor

Affidavit of Robert O'Neill

railroads also have prior CNJ seniority rights. All other train service employees on the Seniority District G roster would have only Conrail seniority when bidding for NJTRO positions. Article X of the Kasher Award prescribes the procedures for the establishment of the Order Selection List and dictates the Order Selection Number based on the employee's standing on the List.

D. From November 22, 1982 through December 2, 1982, pursuant to Article III.A, special advertising bulletins for 578 NJTRO train service assignments were advertised. The 1,766 employees who submitted indications of interest under Article II were eligible to bid for these positions. 839 eligible employees actually bid for these advertised positions.

E. In accordance with Article X.D, the standing of employees on the Order Selection List for purposes of bidding assignments with NJTRO is determined on the basis of their earliest retained seniority dates as trainmen with Conrail or a Conrail predecessor railroad. This ranking of employees on the Order Selection List for bidding purposes commonly is referred to as "dovetailing."

F. In recognition of the fact that the employees on the Seniority District G Roster simultaneously were bidding for positions with three new employers (NJTRO, SEPTA, and Amtrak), it was agreed by the parties that the best procedure was for Conrail to award the Amtrak positions first, and then to award the NJTRO positions, in accordance with the procedures described above.

G. The effect of the procedures described above on the awarding of NJTRO positions is illustrated with the following example:

Affidavit of Robert O'Neill

A senior Conrail train service employee on the Seniority District G Roster with PC prior rights submits a proper indication of interest pursuant to Article II.A of Referee Kasher's Award. In accordance with Articles II.B and X of Referee Kasher's Award and the employee's Conrail seniority, the employee initially is assigned a position on the Order Selection List with Order Selection Number 2 (see Article X.E). This employee then bids for both a NJTRO position pursuant to Article III.A of Referee Kasher's Award in accordance with his dovetailed standing on the Order Selection List, (pursuant to Article X.D) as well as an Amtrak position under the Section 1165 agreement. The employee's bids enable him to obtain an Amtrak position and, in addition, possibly a NJTRO position. The employee is contacted and he elects the Amtrak position and voluntarily withdraws his NJTRO bid. In accordance with Article III.B, since the employee withdraws his NJTRO bid and would otherwise have been awarded a position, he is removed from the NJTRO Order Selection List. As a result, all of the employees with PC prior rights designations on the Order Selection List below the position of Order Selection Number 2 move up to the next available PC prior rights position on the Order Selection List; the other employees on the list do not change positions (i.e., the employee in position number 5 would fill position number 2, the employee in position number 7 would fill position number 5, etc.). *See generally*, Article X.E. of Referee Kasher's Award. The Conrail employee with PC prior rights who had the greatest seniority among those employees not initially placed on the Order Selection List then is placed on the lowest PC prior rights position on the list. The employees standing on the Order Selection List for the awarding of positions would be

Affidavit of Robert O'Neill

redetermined by dovetailing the revised Order Selection List. This procedure then continues until all of the NJTRO positions are awarded.

6. A preliminary evaluation of the NJTRO Order Selection List indicates the dramatic changes which may occur. Upon information and belief, of the 610 names on the initial Order Selection List included as Exhibit B to C. P. Jones' Affidavit, more than one third of the employees (approximately 228) did not bid for any of the NJTRO positions. As a result, these employees will be removed from the Order Selection List pursuant to Article III.B of Referee Kasher's Award. Approximately 160 employees from the 610 on the initial Order Selection List have bid for Amtrak positions. At this time, it is impossible to determine the number of employees from the initial Order Selection List who may receive positions with either SEPTA or Amtrak and elect to withdraw their NJTRO bid. Though it cannot be determined at this time which employees will be placed on the final Order Selection List, it is clear that a great many of the 610 employees on the preliminary Order Selection List will be replaced with more junior employees. It is anticipated that the final Order Selection List will not be determined until on or about December 22, 1982, when the train service positions are awarded under Referee Kasher's Award.

ROBERT O'NEILL

(Sworn to December 15, 1982.)